In The

Supreme Court of the United States

October Term, 1989

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,

Petitioners,

v.

JOSEPH A. BONJORNO, LORRAINE KERR, (EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.,) AND BARBARA K. CLISBY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENTS ON KAISER'S PETITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. In awarding interest on an antitrust treble damage judgment, first recovered in 1979, but where the final amount of the recoverable judgment was not reinstated by the Court of Appeals until 1984 (and the Court's mandate did not issue until 1986), was not the Court below correct in refusing Defendants' contention that interest be calculated under a repealed federal interest statute on routine District Court judgments that had looked to state law (Pennsylvania – 6% simple interest), and which was repealed in 1982?

2. For the reasons fully set forth in Respondents' Cross-Petition and Opening Brief (No. 88-1771), did not the Court of Appeals err in failing to award commercial full market rate interest calculated from 1979 pursuant to its equitable, inherent and Fed. R. App. P. 37 power; – where Plaintiffs (as the wronged party) have been denied for over ten years receiving the full measure of their awards, due to delays in the judicial process not of their making; – and where Defendants (as the wrongdoer) have profited from the use of Plaintiffs' money at commercial market rates in excess of $18.6 million?

LIST OF PARTIES AND RULE 28.1 STATEMENT

1. *Plaintiffs*

Respondents and Cross-Petitioners in No. 88-1771: Joseph A. Bonjorno, Lorraine Kerr (Executrix of the Will of George M. Kerr, Jr.) and Barbara K. Clisby ("Plaintiffs") are the former shareholders and trustees in liquidation of the original Plaintiff below, Columbia Metal Culvert Company of Vineland, New Jersey, which ceased operations in 1977 due to the predatory activity of the Petitioners that was the subject of this lawsuit. Pursuant to Supreme Court Rule 28.1, Plaintiffs state that they have no other corporate affiliations.

Following the death of George M. Kerr, Jr., Respondents petitioned the Court of Appeals to substitute Lorraine Kerr, Executrix of the Will of George M. Kerr, Jr., as a party. That petition was granted by the Court of Appeals on March 29, 1989.

2. *Kaiser*

Petitioners are Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. (collectively "Kaiser") who were Defendants in the antitrust action below. Kaiser's national and international affiliates are listed in Kaiser's Brief at ii – iii.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

LIST OF PARTIES AND RULE 28.1 STATEMENT ... ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES viii

COUNTERSTATEMENT OF OPINIONS BELOW 1

COUNTERSTATEMENT OF JURISDICTION 1

COUNTERSTATEMENT OF COURT RULES & STATUTES 1

COUNTERSTATEMENT OF THE CASE 2

A. THE FACTS NOT IN DISPUTE: Kaiser Does Not Dispute Any Of The Crucial Facts Mandating An Adequate Award Of Interest To Preserve The Value Of The Judgment..... 2

B. KAISER'S GAIN AND PLAINTIFFS' LOSS FROM DELAY: Kaiser Obtained Stays Of Execution And Never Tendered Any Money Between The Establishment Of Liability In 1979 And The Issuance Of The Court Of Appeals' Mandate In 1986 – To This Date Kaiser Has Not Tendered One Penny Of Interest 4

C. NO RETROACTIVITY AT ISSUE: The Court Of Appeals' Decision Under Fed. R. App. P. 37 Awarding Interest On Its 1984 Judgment Does Not Present Any Issues Of Retroactivity..... 5

D. NO MANIFEST INJUSTICE: There Is No Manifest Injustice In Requiring A Wrongdoing Judgment Debtor To Pay Back To The Wronged Judgment Creditor, As Interest, The Benefits It Received From The Use Of The Creditor's Money 6

SUMMARY OF ARGUMENT 9

ARGUMENT..... 12

TABLE OF CONTENTS – Continued

Page

I. INTRODUCTION: THE COURTS' POWER TO AWARD FULL INTEREST 12

II. THE COURT BELOW CORRECTLY REJECTED KAISER'S REQUEST TO APPLY A STATUTE THAT HAD BEEN REPEALED BY CONGRESS SPECIFICALLY TO PREVENT THE RESULT SOUGHT BY KAISER: INADEQUATE AWARDS OF INTEREST UNDER STATE LAW ON FEDERAL COURT JUDGMENTS 14

A. VESTING OF INTEREST CLAIMS: Since Claims For Judgment Interest Are Contingent Until A Final Controlling Judgment Is Entered, Neither Side Has A Vested Right To Receive Or Obligation To Pay Interest While There Is Ongoing Litigation On The Underlying Merits Of A Case 14

1. The Right To Interest Does Not Vest Until A Final Controlling Judgment Is Entered On The Merits 15

2. Kaiser Had No Vested Right To Avoid Paying Adequate Interest 17

B. THIS COURT'S *BRADLEY* ANALYSIS IS SOUND: Kaiser, In Its Attempt To Benefit From A Repealed Statute, States No Basis For Overruling The Longstanding And Unanimous Precedent Of This Court – That Intervening Remedial Or Procedural Changes In Law That Do Not Affect Vested Rights Apply To Pending Cases 20

1. Under *Bradley v. School Board Of Richmond*, Courts Should Apply The Law In Effect As Of The Time Of Decision 20

2. Kaiser's Belated Attack On The *Bradley* Analysis Is Illfounded And Disingenuous 22

TABLE OF CONTENTS – Continued

Page

C. THE *BRADLEY* FACTORS APPLIED TO THIS CASE: Kaiser Fails To Point To Any Evidence Bearing On The *Bradley* Factors (Statutory Direction, Legislative History Or Manifest Injustice) That Would Require Or Permit Awarding Interest Pursuant To A Statute (28 U.S.C. § 1961) Repealed By Congress To Prevent The Very Vice Kaiser Seeks To Unjustly Benefit From 28

1. STATUTORY DECLARATION: Congress Repealed The Law Kaiser Seeks To Apply Today Long Before Any Rights Or Obligations On Interest Vested 30

2. LEGISLATIVE HISTORY: The Legislative History Of The Amendment To §1961 Demonstrates A Clear Intent To Avoid The Very Result Sought By Kaiser: Inadequate Interest Under State Law To Preserve The Value Of Federal Court Judgments 33

3. MANIFEST INJUSTICE: Kaiser Did Not And Could Not Present Any Evidence Of Manifest Injustice In Support Of Its Contention That A Repealed Law Controls Its Interest Obligations 35

(a) *Nature And Identity Of The Parties:* Current Law Should Be Applied To Carry Out Plaintiffs' Private Attorney General Role 35

(b) *Nature Of The Rights:* Application Of Current Law Would Not Deprive Kaiser Of Any Vested Or Matured Or Unconditional Property Rights 36

TABLE OF CONTENTS – Continued

Page

(c) *Nature Of The Impact Of The Change In Law Upon Existing Rights:* Application of Current Law On Interest To A Pending Case Has No Impact On Existing Rights And Does Not Alter The Substantive Law Prohibiting Kaiser's Predatory Conduct 40

D. PUBLIC POLICY: Kaiser Ignores All Of The Important Policy Concerns And Purposes Of Interest Awards That Compel Finding Against Kaiser's Contentions 42

1. Interest Awards Should Recognize Economic Reality And Preserve The Value Of Judgments 42

2. Interest Awards Are Intended To Prevent The Unjust Enrichment Kaiser Seeks At Plaintiffs' Expense 42

3. Kaiser Improperly Seeks To Use Court Delay To Circumvent The Antitrust Laws 43

4. Kaiser Ignores The Implications That Denial Of Adequate Interest Will Have In Encouraging Dilatory Litigation 43

III. KAISER'S CONTENTION THAT ONLY ONE OR TWO DAYS OF INTEREST SHOULD BE AWARDED IS OUTRAGEOUS AND WAS PROPERLY REJECTED BY THE COURT BELOW 43

A. Failure To Award Interest Adequate To Preserve The Value Of The Judgment Would Allow Unjust Enrichment And Unduly Encourage Post-Trial Litigation And Delay 44

B. Neither Of The Two Lower Court Cases Cited By Kaiser Supports Denial Of Interest Over The Period Of Court Delay 44

TABLE OF CONTENTS – Continued

Page

C. Kaiser Cannot Challenge The Power Of The Court Below To Award Interest Back To The Date of A Verdict 48

CONCLUSION 49

APPENDIX OF RULES AND STATUTES

Fed. R. App. P. 37 ..... A-1

28 U.S.C. §1961 ..... A-1

Fed. R. Civ. P. 67 ..... A-2

TABLE OF AUTHORITIES

Page

I. CASES

Affiliated Capital Corp. v. City of Houston, 793 F.2d 706 (5th Cir. 1986) 44, 45

American Tobacco Corp. v. Patterson, 456 U.S. 63 (1982) 33

Bailey v. Chattem, Inc., 838 F.2d 149 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988) 28, 32

Bennett v. New Jersey, 470 U.S. 632 (1985) 27

Bigelow v. RKO Pictures, Inc., 327 U.S. 251 (1946) 41

Blair v. Birkenstock, 271 U.S. 348 (1926) 19

Bowen v. Georgetown University Hospital, 109 S. Ct. 468 (1988) 10, 23, 26, 29

Bradley v. School Board of Richmond, 416 U.S. 696 (1974) ..... *passim*

Brooks v. United States, 757 F.2d 734 (5th Cir. 1985) 28

Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119 (7th Cir. 1987) 47

Brown & Williamson Tobacco Corp. v. Jacobson, Nos. 86-2474, 86-2475, 1987 U.S. App. LEXIS 15194 (7th Cir. Nov. 6, 1987) 46

Campbell v. United States, 809 F.2d 563 (9th Cir. 1987) 28, 32, 34, 38, 41

Carpenter v. Wabash Ry. Co., 309 U.S. 23 (1940) 21

Columbia Brick Works, Inc. v. Royal Ins. Co., 768 F.2d 1066 (9th Cir. 1985) 18

TABLE OF AUTHORITIES – Continued

Page

Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978) 45

Devex Corp. v. General Motors Corp., 749 F.2d 1020 (3d Cir. 1984), *cert. denied*, 475 U.S. 819 (1985) 18, 37, 38, 41

Dinsmore v. Southern Express Co., 183 U.S. 115 (1901) 21

Edwards v. Aetna Life Ins. Co., 690 F.2d 595 (6th Cir. 1982) 39

Evans v. City of Chicago, 873 F.2d 1007 (7th Cir. 1989) 28

Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986) 36

Funkhouser v. J.B. Preston Co., 290 U.S. 163 (1933) 16

Gleason v. United States, 458 F.2d 171 (3d Cir. 1972) 39

Greene v. McElroy, 360 U.S. 474 (1959) 25

Greene v. United States, 376 U.S. 149 (1964) 25

Gulf Colorado & S.F. Ry. Co. v. Dennis, 224 U.S. 503 (1912) 21

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981) 21

Haggar Co. v. Helvering, 308 U.S. 389 (1940) 33

Handgards, Inc. v. Ethicon, Inc., 552 F. Supp. 820 (N.D. Cal. 1982), *aff'd*, 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985) 32

Hoover v. Ronwin, 466 U.S. 558 (1984) 23

TABLE OF AUTHORITIES – Continued

Page

Lawrence v. ICC, 629 F. Supp. 819 (E.D. Pa. 1985) 40

Lehrman v. Gulf Oil Corp., 500 F.2d 659 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975) 46

Litton Systems, Inc. v. AT&T, Inc., 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984) 38

Litton Systems, Inc. v. AT&T, Inc., 746 F.2d 168 (2d Cir. 1984) 7, 18, 25, 28, 32, 37-38

Litton Systems, Inc. v. AT&T, Inc., 91 F.R.D. 574 (S.D.N.Y. 1981), *aff'd*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984) 38

Maryland v. Baltimore & Ohio Ry. Co., 3 How. (44 U.S.) 534 (1845) 21

Merit Ins. Co. v. Leatherby Ins. Co., 728 F.2d 943 (7th Cir. 1984) 28

Missouri & Ark. Lumber & Mining Co. v. Sebastian County, 249 U.S. 170 (1919) 17

Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 7, 36

Morley v. Lake Shore & M.S. Ry. Co., 146 U.S. 162 (1892) 16, 17, 37

Munn v. Illinois, 94 U.S. 113 (1876) 16

Newman v. Piggy Park Enterprises, Inc., 390 U.S. 400 (1968) 35

Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 848 F.2d 613 (5th Cir. 1988) 32

Northern Natural Gas Co. v. Hegler, 818 F.2d 730 (10th Cir. 1987) 14

TABLE OF AUTHORITIES – Continued

Page

Phoenix Canada Oil Co. Ltd. v. Texaco, Inc., 842 F.2d 1466 (3d Cir.), *cert. denied*, 109 S. Ct. 273 (1988) 37

R.W.T. v. Dalton, 712 F.2d 1225 (8th Cir.), *cert. denied*, 464 U.S. 1009 (1983) 28, 32, 39

Reaves v. Ole Man River Towing, Inc., 761 F.2d 1111 (5th Cir. 1985) 32

Second Employers' Liability Cases, 223 U.S. 1 (1912) 16

Shook & Fletcher Insulation Co. v. Central Rigging & Contracting Corp., 684 F.2d 1383 (11th Cir. 1982) 17

Spang Industries Inc. v. Aetna Casualty & Surety Co., 512 F.2d 365 (2d Cir. 1975) 17

Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969) 21, 22, 25, 26

Union Pacific Ry. Co. v. Laramie Stock Yards Co., 231 U.S. 190 (1913) 25

United States v. American Trucking Ass'n, Inc., 310 U.S. 534 (1940) 33

United States v. Dollar Rent-A-Car Sys., Inc., 712 F.2d 938 (4th Cir. 1983) 28

United States v. Heth, 3 Cranch (7 U.S.) 399 (1806) 26

United States v. Lovasco, 431 U.S. 783 (1977) 23

United States v. Magnolia Petroleum Co., 276 U.S. 160 (1928) 18, 19

United States v. Mills, 372 F.2d 693 (10th Cir. 1966) 40

United States v. Schooner Peggy, 1 Cranch (5 U.S.) 103 (1801) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

United States v. Security Industrial Bank, 459 U.S. 70 (1982) 26

United States v. 49.01 Acres of Land, 802 F.2d 387 (10th Cir. 1986) 39

Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941) 21

II. STATUTES & RULES

28 U.S.C. §1961 ..... *passim*

Fed. R. App. P. 37 ..... *passim*

Fed. R. App. P. 69(a) 15

Fed. R. Civ. P. 58 49

Fed. R. Civ. P. 67 ..... 3, 4, 41

III. OTHER AUTHORITIES

Reitz, *Interest on Judgments in Federal Litigation: 28 U.S.C. § 1961*, J.A. 212 (1986) ..... *passim*

Note, *The Postjudgment Interest Rate: Ignoring Reality For Too Long*, 23 Duq. L. Rev. 1083 (1985) 33

Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 Harv. L. Rev. 1566 (1966) 46

Vold, *Are Threefold Damages under the Anti-Trust Act Penal or Compensatory?*, 28 Ky. L.J. 117 (1939) 46

S. Rep. No. 97-275, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News at 11 ..3, 31, 33-34

H.R. Doc. No. 96-59, 96th Cong., 1st Sess. (1979) 34

BONJORNO TIME LINE

1972 Kaiser's threat to drive Columbia out of business

1973 Kaiser opens plant near Columbia's plant and hires away Columbia's best salesman, Robert Kennedy

1/7/74 Complaint filed

1974 Price Squeeze

1975 Kaiser's conduct causes Columbia to stop producing pipe

5/2/77 First Trial, Directed Verdict

5/31/77 Cutoff date for damages

5/24/78 Court of Appeals reverses directed verdict and remands for trial

1978 Columbia's plant sold to third party

8/16/79 Trial and Liability Verdict

8/21/79 First Damage Verdict

8/22/79 *Money Judgment Entered $5.4mm

6/17/81 District Court grants new trial on damages

12/2/81 Second Jury Verdict on Damages

12/4/81 *Judgment Entered $9.6mm

1981 Kaiser purchases Columbia's plant

10/1/82 Effective Date of 28 U.S.C. Section 1961 as amended

1/18/83 *District court grants partial NOV, judgment $4.7mm

12/27/84 *Court of Appeals affirms liability, vacates judgment NOV and reinstates $9.6mm damage judgment

6/6/85 Kaiser petition for certiorari

6/23/86 U.S. Supreme Court denies cert. petition

7/1/86 Court of Appeals issues mandate

7/3/86 Kaiser pays $9,567,939 to Plaintiffs

4/11/88 District Court Awards interest $2,632,886

1/9/89 Court of Appeals Judgment Awarding Interest at T-bill rate

1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989

*denotes the various "judgments" entered in this case

COUNTERSTATEMENT OF OPINIONS BELOW

For a complete statement of the opinions below, as well as the earlier reported decisions in this protracted litigation, Plaintiffs respectfully refer the Court to page 1 of the Brief for Cross-Petitioners on the Merits of Plaintiffs' Cross-Petition in No. 88-1771 ("Plaintiffs' Opening Brief").[1]

COUNTERSTATEMENT OF JURISDICTION

Plaintiffs incorporate the Statement of Jurisdiction from page 2 of Plaintiffs' Opening Brief. With respect to Kaiser's Statement of Jurisdiction, Plaintiffs note that Plaintiffs, as well as Kaiser, filed a Petition for Rehearing before the Court of Appeals. Judges Becker and Hutchinson dissented from the denial of rehearing, but did not indicate whether they were disposed in favor of either Plaintiffs' Petition for Rehearing or Kaiser's. *See* Kaiser Pet. A-29-30.

COUNTERSTATEMENT OF COURT RULES & STATUTES

Ignoring the broad power of the Court of Appeals to award appropriate interest on its judgments, Kaiser omits Fed. R. App. P. 37 from its statement. In addition, Kaiser omits from its quotation of 28 U.S.C. §1961, as amended, the provisions at issue in §1961(b) (requiring annual compounding) and §1961(c)(4) (limiting the scope of the courts whose judgments are covered). Fed. R. App. P. 37 and 28 U.S.C. §1961, as amended, are set forth in the statutory appendix to this Brief. Also included is Fed. R. Civ. P. 67.

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[1] Reproduced for the convenience of the Court on the opposite page is Plaintiffs' "Bonjorno Time Line" from the Appendix to the Cross-Petition.

COUNTERSTATEMENT OF THE CASE

Plaintiffs incorporate the Statement of the Case from pages 2-11 of Plaintiffs' Opening Brief (No. 88-1771). Plaintiffs respectfully refer the Court to the Bonjorno Time Line opposite page 1 for a summary of the principal events in this litigation from 1972. Below is a recap of the most significant admissions as well as omissions and mischaracterizations from Kaiser's Brief.

A. THE FACTS NOT IN DISPUTE: Kaiser Does Not Dispute Any Of The Crucial Facts Mandating An Adequate Award Of Interest To Preserve The Value Of The Judgment

Kaiser does not and cannot dispute:

1. *KAISER'S 1979 LIABILITY*: Kaiser's liability for intentional, predatory destruction of Plaintiffs' business over the period from 1971 to 1977 was established in August 1979, and that finding of liability has never been disturbed. (J.A. 87-90, 101-02, 154, 190-98).[2]

2. *DAMAGES MEASURED AS OF 1973 TO 1977*: Plaintiffs' damages were valued as of no later than May 31, 1977, with some damages valued as early as 1973, and no prejudgment interest. *See* J.A. 90, 129, 170.[3] (Kaiser argued to the jury damages should be valued as of 1975 (J.A. 131-34)).

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[2] Plaintiffs did not file post-trial motions after the 1979 verdicts and judgment, although the jury awarded much lower damages than Plaintiffs had sought. Kaiser alone filed post-trial motions, and obtained a retrial limited to recalculation of damages in which the 1979 jury's damage award was *emphatically reaffirmed* by the second unanimous jury. *Compare* J.A. 90-91 ($5,445,000) *with* J.A. 145-46 ($9,567,939).

[3] Despite the lack of any interest over the period from 1973 to the original judgment in 1979, Plaintiffs have only sought interest from the date of their original judgment over the long periods of delay caused by

(Continued on following page)

3. *DELAY IN PAYMENT OF ORIGINAL LIABILITY*: Kaiser paid Plaintiffs no money until July 3, 1986, (Kaiser Brief at 5), although Kaiser's liability was established in 1979 and Plaintiffs' damages were valued as of 1973 to 1977.

4. *CONTINUED DELAY IN PAYMENT OF INTEREST LIABILITY*: Kaiser, to this day, has never tendered to Plaintiffs or into court, under Fed. R. Civ. P. 67, one penny of interest to stop or reduce the continued running of interest. See pp. 4-5 below.

5. *KAISER'S GAIN, AND PLAINTIFFS' LOSS, FROM DELAY*: Kaiser's gain and Plaintiffs' corresponding loss at commercial market rates from delay in payment of the judgment amount ($9,567,939) from August 1979 to the date of briefing before the court below, was over $17 million (J.A. 303) (increased to $18.6 million as of August 3, 1989). Only $8 or $12 million would be awarded under the Court of Appeals' decision. Plaintiffs' Opening Brief at 44 n.72; Kaiser Brief at 10.

6. *OLD §1961 REPEALED TO PROHIBIT INADEQUATE STATE LAW INTEREST*: Current law for interest awards now in effect, and in effect as of the Court of Appeals judgment on the merits (December 27, 1984) and issuance of the mandate (July 1, 1986), is Fed. R. App. P. 37 and amended 28 U.S.C. §1961. The latter was enacted by Congress in 1982 expressly to preserve federal court judgments and prevent inadequate interest under state law, as provided under the version repealed in 1982. S. Rep. No. 275, 97th Cong., 2d Sess. at 11, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 21.

(Continued from previous page)

Kaiser's post-trial motions and Kaiser's refusal to accept the verdicts of the juries and judgments of the courts.

Kaiser's notation that the 1983 appeal was "initiated" by Plaintiffs and that Kaiser "cross-appealed the liability issues" (Kaiser Brief at 44 n.20) disregards Kaiser's post-trial motions challenging the 1981 damage recalculation it had sought which were the source of the delay.

B. KAISER'S GAIN AND PLAINTIFFS' LOSS FROM DELAY: Kaiser Obtained Stays Of Execution And Never Tendered Any Money Between The Establishment Of Liability In 1979 And The Issuance Of The Court Of Appeals' Mandate In 1986 – To This Date Kaiser Has Not Tendered One Penny Of Interest

Although Kaiser, at any time from the date of the receipt of Plaintiffs' Complaint in 1974 to today,[4] could have tendered the amount of its anticipated liability into court under Fed. R. Civ. P. 67 to stop or reduce the running of interest, it did not. It has never tendered any money into court and refused to tender any money to Plaintiffs between the 1979 liability finding and original judgment and the 1986 issuance

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[4] 1. On Aug. 22, 1979, when the original judgment in the amount of $5,445,000 against Kaiser was entered (J.A. 91), Kaiser did not tender that amount into court to stop or reduce the running of interest;

2. On Dec. 4, 1981, after the damage retrial requested by Kaiser, Kaiser did not tender the $9,567,939 judgment amount (J.A. 146) or any interest into court;

3. On Jan. 18, 1983, when the District Court reduced the amount of the judgment to $4.7 million (J.A. 184), Kaiser did not tender even that amount into court;

4. On Dec. 27, 1984, when the Court of Appeals ordered that the judgment amount be increased to $9,567,939 as determined by the jury (J.A. 210-11), Kaiser did not tender that amount or any interest into court;

5. On July 3, 1986, when Kaiser paid Plaintiffs $9,567,939 after issuance of the Court of Appeals' mandate, it did not tender into court any amount of interest to stop or reduce the continued running of interest;

6. On April 11, 1988, when the District Court awarded interest of $2,632,886 (Kaiser Pet. A-31, 56), Kaiser did not tender even that amount into court (*see* J.A. 59-60; R. 842-44);

7. On Jan. 9, 1989, when the Court of Appeals ordered that interest be awarded under the current version of 28 U.S.C. §1961 (Kaiser Pet. A-1), Kaiser did not tender into court either the $8.3 million or $12 million interest amount (see Plaintiffs' Opening Brief at 44 n.72; Kaiser Brief at 10).

of the Court of Appeals' mandate. To this day, it has refused to tender even one penny of interest to Plaintiffs.

In seeking an adequate award of interest, Plaintiffs do not seek to impose any new or additional obligations on Kaiser. Rather, they seek only to disgorge Kaiser's gain at Plaintiffs' expense in an amount in excess of $18.6 million. See Plaintiffs' Opening Brief at 7 & n.12.

C. NO RETROACTIVITY AT ISSUE: The Court Of Appeals' Decision Under Fed. R. App. P. 37 Awarding Interest On Its 1984 Judgment Does Not Present Any Issues Of Retroactivity

Contrary to Kaiser's mischaracterization of the issues (Kaiser Brief at 24-34), both the District Court and the Court of Appeals below considered the issue of appropriate interest on the Court of Appeals' judgment of December 27, 1984.[5] Prior to its entry, neither Plaintiffs nor Kaiser could have any vested right to rely on a particular rate of interest. The version of §1961 that Kaiser seeks to apply was repealed by Congress in 1982.

It was not until two years later (December 27, 1984) that the Court of Appeals judgment on the merits was entered; and not until four years later that this Courts' denial of certiorari on June 23, 1986 made it possible for the first time for Plaintiffs to compel partial payment of the amount owed.

Congress has repealed the version of 28 U.S.C. §1961 Kaiser seeks to apply today. That *repeal occurred long before any rights or obligations of the parties with respect to interest*

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[5] On June 24, 1986, prior to issuance of the Court of Appeals' mandate on its Dec. 27, 1984 judgment (which affirmed the 1979 liability finding and reinstated the full treble damage award of $9.5 million), Plaintiffs petitioned for instructions in the Court of Appeals' mandate with regard to interest under Fed. R. App. P. 37 and 28 U.S.C. §1961. (J.A. 75; R. 351-52). Pursuant to the stipulation of the parties approved by the Court of Appeals, the issue of the appropriate interest on the Court of Appeals' Dec. 27, 1984 judgment was referred to the District Court in the first instance. J.A. 75; Kaiser Pet. A-7, 865 F.2d at 568-69.

vested into matured and unconditional rights and obligations.[6] The court below found there was no issue of retroactive application of law in the present case:

> Bonjorno's right to receive interest [and accordingly Kaiser's obligation to pay any particular amount of interest] did not mature or become unconditional until a final controlling judgment was entered on the merits. This did not occur until after the effective date of the amendments.

Kaiser Pet. A-22, 865 F.2d at 575.

D. *NO MANIFEST INJUSTICE*: There Is No Manifest Injustice In Requiring A Wrongdoing Judgment Debtor To Pay Back To The Wronged Judgment Creditor, As Interest, The Benefits It Received From The Use Of The Creditor's Money

As Kaiser notes in its Statement of the Case on pages 9-10, the effect of the decision of the Court of Appeals is to award interest in the range of $8.5 or $12 million.[7] Given Kaiser's gain at its own cost of money of more than $18.6 million from the use of Plaintiffs' money, there is and can be no manifest injustice to Kaiser in the decision of the Court of Appeals.

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[6] Congress repealed the law Kaiser seeks to apply in 1982: *two years before* the 1984 judgment of the Court of Appeals on which Plaintiffs are entitled to interest (J.A. 210), *four years before* the issuance of the Court of Appeals' mandate in 1986 (J.A. 209), *six years before* the District Court decision on interest in 1988 (J.A. 58, 59), *seven years before* the Court of Appeals' decision below in 1989 (Kaiser Pet. A-1), and *eight years before* this Court will render its decision on interest in 1990.

[7] If interest were awarded under amended §1961 calculated back to the original judgment date of Aug. 22, 1979, interest would amount to approximately $11.9 million as of Aug. 3, 1989 under the Aug. 22, 1979 T-bill rate of 10.05%, compounded annually. *See* Plaintiffs' Opening Brief at 8 & n.14; *see also* J.A. 308.

The record is void of any evidence of manifest injustice to Kaiser or to public policy concerns. Kaiser has not attempted to point to any such evidence. *See* J.A. 1-311. The only record evidence establishes that Kaiser's undisputed gain and Plaintiffs' corresponding loss at commercial market rates of interest by delay in payment of the judgment was over $17 million as of the date of briefing before the Court of Appeals (J.A. 303).

The court below carefully considered and rejected Kaiser's contention that application of current law would result in manifest injustice, considering: (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights. Kaiser Pet. A-21-23, 865 F.2d at 575-76.

The Nature And Identity Of The Parties

The court below first noted that failure to apply current law would undermine federal antitrust policy, and therefore the factor of the nature and identity of the parties "weighs heavily against finding manifest injustice":

> The plaintiffs in the present case are acting as private attorneys general in enforcing federal policy embodied in the antitrust laws. *See, e.g., Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 634-35 (1985) (stating that "[a] claim under the antitrust laws is not merely a private matter.") (citations omitted). We believe that an action to increase the rate at which post judgment interest accrued on a judgment awarded to a private antitrust plaintiff also implicates national interests. *But see Litton*, 746 F.2d at 175 [footnote omitted]. When antitrust plaintiffs serve the national interest by acting as private attorneys general in enforcing the antitrust laws, the congressional mandate that plaintiffs who prevail in such a suit be awarded treble damages should not be diminished by insufficient post judgment interest. Therefore, this factor *weighs heavily* against finding manifest injustice.

Kaiser Pet. A-21-22, 865 F.2d at 575 (emphasis added).

The Nature Of The Parties' Rights

The court below considered whether the application of amended 28 U.S.C. §1961 in this action, which was pending in the District Court as of the date of the amendment, " 'would infringe upon or deprive a person of a right that had matured or become unconditional.' " Kaiser Pet. A-22, 865 F.2d at 575 (quoting *Bradley*, 416 U.S. at 720). The court below recognized Plaintiffs' vesting argument in its statement that:

> Bonjorno's right to receive interest did not mature or become unconditional until a final controlling judgment was entered on the merits. This did not occur until after the effective date of the amendments.

Id. Thus, the court below recognized that neither Plaintiffs nor Kaiser had any vested right to rely upon interest at any particular rate until a final controlling judgment was entered on the merits.

Nature Of The Impact Of The Change In Law Upon Those Rights

The court below, in addressing the third factor of manifest injustice, noted that the impact of changes in law on vested rights depended on whether " 'new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard.' " Kaiser Pet. A-23, 865 F.2d at 575 (quoting *Bradley*, 416 U.S. at 720). Analyzing this factor, the court noted:

> the fact that this case involves a judgment that was appealed long after the enactment date supports the position that imposition of the T-bill rate after the effective date does not constitute an unforseeable obligation.

The court went on to state:

> However, we go even further and hold that imposition of the T-bill rate [for the earlier period] would not constitute manifest injustice * * * [and] * * * hold that the amended version of section 1961

> applies as current law, regardless of whether interest begins to accrue under the statute prior to October 1, 1982.

Kaiser Pet. A-23, 865 F.2d at 575-76.

Thus the court below recognized that application of current law giving a closer approximation of the true cost of money did not impose any new or unanticipated obligations.

The court below concluded there was no manifest injustice in its narrow holding on the facts of the present case:

> In view of the nature and identity of the parties, the nature of their rights and the nature of the impact of the change in law on their rights, we conclude that application of the T-bill rate to the entire period does not result in manifest injustice.

Kaiser Pet. A-23, 865 F.2d at 576.

SUMMARY OF ARGUMENT

1. *POWER OF THE COURTS TO RECOGNIZE ECONOMIC REALITY*: For reasons fully developed in Respondents' Opening Brief as Cross-Petitioners in No. 88-1771 and summarized in section I below (pp. 12-14), only an award of commercial market rate interest for the full period from Plaintiffs' original judgment in 1979 will vindicate the fourfold purposes of interest awards.[8] Thus, in cases such as this,

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[8] In the present case, the fourfold purposes of interest are:

1. *To preserve* the value of the judgment and recognize economic reality.
2. *To prevent unjust enrichment* of the wrongdoer at its victim's expense.
3. *To vindicate* in *antitrust* cases congressional *policy* to ensure ample compensation to the victim and to deter the wrongdoer and others from unlawful conduct.
4. *To remove financial incentives for* exhaustion of post-trial and appellate remedies whereby the party delaying payment benefits from delay.

plagued with delays in the judicial process, not of Plaintiffs' making, a Court of Appeals has the power (inherent, equitable and under Fed. R. App. P. 37) to award adequate interest, over and above that provided under the current version of 28 U.S.C. §1961, to preserve the value of the judgment – and should exercise that power in this case.

The court below, while erring in failing to award commercial rates, correctly rejected Kaiser's contention that an entirely inadequate 6% interest rate should apply under a statute repealed two years before the Court of Appeals' judgment on the merits and four years before issuance of the mandate following this Court's denial of certiorari.

If this Court affirms Plaintiffs' position on its Cross-Petition, that the Courts of Appeals in cases such as this have power to award interest at commercial rates, it need not address any of the issues raised by Kaiser's unfounded claim of retroactive application of a federal interest statute for District Court judgments, 28 U.S.C. §1961, neither the repealed nor the current version of which controls this case.

2. *NO RETROACTIVITY AT ISSUE*: Kaiser's contention that this case turns on application of principles of retroactivity, as recently set forth by this Court in *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468 (1988) (federal government rebuffed in attempt to retroactively deny millions of dollars of health care reimbursement payments to private hospitals that had relied on regulations authorizing them at time of expenditure), is absurd[9] and without factual or legal foundation.[10] Intervening procedural and remedial changes in

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[9] Kaiser contends that this Court's recent unanimous decision in *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), which is based on 188 years of Supreme Court precedent, should be overruled because its "manifest injustice" analysis generates "unfair results." Kaiser Brief at 35.

[10] See p. 24 n.25 below, where Plaintiffs point out why the facts and legal issues in *Bowen* have nothing to do with the present case.

(Continued on following page)

law should be applied to pending cases unless such application would result in *manifest injustice* or there is statutory direction or legislative history contrary to application to pending cases. Where, as in the present case, *no vested rights or obligations* are affected by the change in law, there is no retroactivity and no manifest injustice to Kaiser in refusing its request that its interest obligations be determined by a repealed statute.

3. *KAISER'S IMPROPER RELIANCE ON A REPEALED STATUTE*: The law Kaiser seeks to apply was repealed by Congress over seven years ago precisely to prevent the result Kaiser asks this Court to impose: inadequate awards of interest at state law rates (6% simple) that *totally ignore economic reality* and fail to preserve the value of federal court judgments – thereby creating incentives to *overburden the federal courts* with repeated relitigation of the issues and allowing stays obtained in federal courts of equity to be abused as a vehicle creating *unjust enrichment* for adjudicated wrongdoers at their victims' expense.

4. *NO MANIFEST INJUSTICE*: The court below, while erring in failing to address, consider or exercise its powers to fulfill the purposes of interest by awarding full commercial market rates, nevertheless properly rejected Kaiser's belated attack[11] on the controlling, unanimous precedent of this Court (*Bradley v. School Board of Richmond*, 416 U.S. 696 (1974)) – followed by every other Court of Appeals addressing the applicability of amended 28 U.S.C. §1961 to pending cases –

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Further, Kaiser, while reciting the word "retroactivity," *admits* that the current version of §1961 (T-bill rate) was the law in effect as of the date of a final controlling judgment on the merits. Kaiser Brief at 24 n.5. Thus, "* * * Kaiser agrees that the 1982 amendment to §1961 applies * * *." Kaiser's only argument in favor of application of the repealed version of §1961 is that the repealed version should apply because interest on the judgment is properly calculated commencing as of date earlier than 1982.

[11] *See* pp. 22-23 & n.23 below, where Plaintiffs note that Kaiser's attack on *Bradley* is out of time.

i.e., that current law applies unless manifest injustice would result. There is no manifest injustice in disgorging Kaiser's gain at Plaintiffs' expense from its delay in payment of the judgment since 1979.

There would be gross manifest injustice *to Plaintiffs* and the public policy considerations underlying the award of interest if Plaintiffs were limited to interest under Pennsylvania law and were not awarded interest at full commercial market rates for the entire period.

5. *THE EQUITIES AND PUBLIC POLICY*: Kaiser's gain, and Plaintiffs' loss, from Kaiser's use of Plaintiffs' money over the ten years since the original judgment is more than $18.6 million. Kaiser's contention that an entirely inadequate amount (either one day of interest or interest at 6% without any compounding: $2.6 million) should be imposed by this Court is one of incredible greed and an affront to one's sense of fairness, justice and right, as well as to the equity powers of the federal courts, which are charged with the duty of giving effect to the antitrust laws and rendering justice under the law. It is a blatant, unabashed request for this Court to take away from Plaintiffs – and give to the monopolistic predator that destroyed their business and their lives – $16 million of Plaintiffs' money.[12] Such unjust enrichment of adjudicated wrongdoers at their victims' expense cannot be condoned in courts of equity.

ARGUMENT

I. INTRODUCTION: THE COURTS' POWER TO AWARD FULL INTEREST

Plaintiffs' position as Cross-Petitioners is fully developed in their Opening Brief in No. 88-1771. There, Plaintiffs establish that their right to interest (which did not vest at least until 1984, when the Court of Appeals affirmed the 1979

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[12] $18.6 million less the $2.6 million of interest now proposed by Kaiser as an alternative to its contention that it only owes one day of interest.

liability and reinstated the full amount of the damage award), is *not* controlled by the federal interest statute, 28 U.S.C. §1961, for levy of execution of interest by the Marshal on routine judgments entered in the federal District Courts.

Therefore, it is of no consequence whether the *repealed* version which looked to state law (Pennsylvania 6% simple interest) as advocated by Kaiser, or the *current* version of 28 U.S.C. §1961 as amended in 1982 (T-bill rate – 2 to 3 points below prime, compounded yearly – 10.05% as of August 1979) applies.

Rather, where, as in cases such as this, there have been extraordinary delays in the judicial process, not of Plaintiffs' making, Courts of Appeals reinstating an earlier judgment have the equitable and inherent power, as well as power under Fed. R. App. P. 37, to award such rate of interest (at the commercial market rate: prime, compounded monthly) that will carry out the fourfold purposes of interest:

1. *Preserve* the value of judgments against erosion over time due to the time value of money at rates that recognize economic reality.

2. *Prevent* unjust enrichment where, as here, the defendant had the use of Plaintiffs' money at commercial market rates since liability first attached in 1979, and has benefitted by the use of such money by a sum in excess of $18.6 million.

3. *Vindicate* national trade regulation policy to amply compensate the wronged and to deter the wrongdoer and others from future unlawful action.

4. *Discourage* litigants from overlitigating and attempting to benefit from delays by accumulating interest at market rates while exhausting their judicial remedies.

In this brief, Plaintiffs address Kaiser's contentions that the old version of 28 U.S.C. §1961, repealed by Congress in 1982, controls. Only if this Court were to conclude that there is no power in the Courts of Appeals to award commercial

market rates,[13] would any of the arguments advanced in this brief favoring application of the current federal interest statute (as determined by the court below) over the repealed statute have any relevance or bearing on the final award of interest in this case.

In sum, all of the issues raised by Kaiser, including (1) whether the Court should apply a repealed statute and (2) its vacillating position[14] on the *Bradley* rule regarding application of current law, are irrelevant. They need not be reached by this Court to decide this case.

As Plaintiffs have demonstrated in their Cross-Petition Brief, awards of interest by the Courts of Appeals are not controlled by the federal interest statute for levy of execution for interest calculated by the marshal on routine federal District Court judgments. Rather, the Courts of Appeals have power, and respectfully should, in cases such as this, award the appropriate interest that will carry out the fourfold purposes of interest discussed above.

II. THE COURT BELOW CORRECTLY REJECTED KAISER'S REQUEST TO APPLY A STATUTE THAT HAD BEEN REPEALED BY CONGRESS SPECIFICALLY TO PREVENT THE RESULT SOUGHT BY KAISER: INADEQUATE AWARDS OF INTEREST UNDER STATE LAW ON FEDERAL COURT JUDGMENTS

A. VESTING OF INTEREST CLAIMS: Since Claims For Judgment Interest Are Contingent Until A Final Controlling Judgment Is Entered, Neither Side Has A Vested Right To Receive Or Obligation To Pay Interest While There Is Ongoing Litigation On The Underlying Merits Of A Case

Plaintiffs had no unconditional claim for judgment interest (and Kaiser had no unconditional obligation to pay such

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[13] Even under the equity of §1961, as the Tenth Circuit held, the courts "ha[ve] discretion to keep the rates in accordance with the real world." *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 738 (10th Cir. 1987), *cert. dismissed*, 109 S. Ct. 28 (1988); *see also* Plaintiffs' Opening Brief at 39 & n.60.

[14] See pp. 22-23 & n.23 below.

interest) until all litigation on the merits had ended in Plaintiffs' favor. If the Defendant had prevailed on the merits, Plaintiffs would never have had a claim for interest. The claim for judgment interest ripened only as of this Court's denial of certiorari on the Court of Appeals' judgment on the merits in 1986. *At that time*, for the first time, Plaintiffs could and did claim judgment interest. The rule and statute then in effect were Fed. R. App. P. 37 and the current §1961. There was no change in law while the claim for judgment interest was pending. The law has not changed since the claim for judgment interest ripened. Therefore, there is no retroactivity at issue, and no basis whatsoever to apply a law repealed before the interest claim matured.

1. The Right To Interest Does Not Vest Until A Final Controlling Judgment Is Entered On The Merits

The court below correctly held that the award of interest in this case does not involve any issues of retroactive application of any statute. Kaiser Pet. A-17, 865 F.2d at 573. The version of the federal statute for routine District Court judgments in effect when the right to interest vested[15] was the current version of 28 U.S.C. §1961, providing for interest at T-bill rates, not the version looking to state law repealed by Congress in 1982. *See* Reitz, *Interest on Judgments In Federal Litigation, 28 U.S.C. §1961*, J.A. 212 at 215-17, 267-76.[16]

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[15] To the extent 28 U.S.C. §1961 essentially provides a remedy ancillary to execution on and enforcement of a District Court judgment, the version applied should be that in effect as of the date the remedy of interest is sought. *See* Fed. R. Civ. P. 69(a) ("The procedure on execution * * * shall be in accordance with the practice and procedure of the state * * * *existing at the time the remedy is sought*, except that any statute of the United States governs to the extent it is applicable.") (emphasis added).

[16] Reproduced in the Joint Appendix, beginning at J.A. 212, is a scholarly analysis of application of 28 U.S.C. §1961 in federal litigation

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It is well established that the right to receive and the obligation to pay interest on a judgment (whether ordered pursuant to the inherent or equitable power of the court or under Fed. R. App. P. 37 or 28 U.S.C. §1961) does not vest into a matured or unconditional right at least until after entry of a final controlling judgment on the merits – which did not occur in the present case until well after 1982. *Funkhouser v. J.B. Preston Co.*, 290 U.S. 163, 167-68 (1933);[17] *cf. Morley v.*

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prepared by Curtis R. Reitz, Algernon Sydney Biddle Professor of Law University of Pennsylvania, at Plaintiffs' request in October 1986, which Plaintiffs submitted to the courts below. There at pages J.A. 235 through J.A. 239, he cogently describes with great clarity the vesting concept. References to Professor Reitz', analysis are set forth as "Reitz, J.A. ___."

[17] In *Funkhouser*, this Court held that parties to contracts and to litigation *do not have vested rights to avoid paying adequate interest under intervening law* enacted prior to a final controlling judgment. 290 U.S. at 167-68. This Court affirmed the holding that a State statute required interest on judgments for breach of contract even when the contract being enforced predated the interest provision.

In language particularly relevant to the present case in which Plaintiffs merely seek an adequate award of interest as a remedy ancillary to their judgment for Kaiser's fifteen-year-old violation of the antitrust laws, the Court noted that:

> "To enact laws providing remedies for a violation of contracts" and "to alter or enlarge those remedies from time to time," was within the competency of the legislature.
>
> * * * *
>
> The parties make their contract with reference to the existence of the power of the State to provide remedies for enforcement and to secure adequate redress in case of breach.

Id. (citations omitted). *Cf. Second Employers' Liability Cases*, 223 U.S. 1, 50 (1912) ("A person has no property, no vested interest, in any rule of the common law. * * * Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will * * * of the legislature unless prevented by constitutional limitations.) (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

Lake Shore & M.S. Ry Co., 146 U.S. 162 (1892) (discussed below at n.18). As of 1982, this case was still pending in the District Court on Kaiser's post-trial motions on the merits.

2. Kaiser Had No Vested Right To Avoid Paying Adequate Interest

Kaiser improperly views the entry of a judgment against it in 1979 as an event giving it a vested right to delay execution of the judgment for as long as possible so that it could benefit from a sub-market interest rate. That perverse position ignores:

(1) the inherent and equitable power of the courts to award adequate interest (See Plaintiffs' Opening Brief);

(2) the lack of any unconditional right to receive or avoid paying adequate interest on a judgment that is not a final controlling judgment (see pp. 14-16 above);

(3) the distinction between the final controlling judgment vesting rights and obligations and an interim judgment that sets the date back to which interest should be calculated; and

(4) the lack of any vested right to continue to avoid paying any particular rate of interest even after entry of a final controlling judgment.[18]

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[18] Kaiser's contention that a repealed statute governs the rate of interest is a request for this Court to overrule 100 years of its well established precedent that the parties to a judgment have no *vested right* to continued application of any particular rate of interest on a judgment, *even after that judgment has become a final controlling judgment after the expiration of all appeals. E.g., Morley v. Lakeshore & M.S. Ry Co.*, 146 U.S. 162, 168-69 (1892); *see also Missouri & Ark. Lumber & Mining Co. v. Sebastian County*, 249 U.S. 170, 172-73 (1919); *Spang Indus. Inc. v. Aetna Cas. & Sur. Co.*, 512 F.2d 365, 371-72 (2d Cir. 1975); *Shook & Fletcher Insulation Co. v. Central Rigging & Contracting Corp.*, 684 F.2d

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In complex litigation, there are frequently a number of judgments entered. Thus, as Professor Reitz notes, because the claim for interest does not mature until the merits are resolved, one should look to the final controlling judgment on the merits to determine a party's right to receive interest as provided by the *applicable* law at that time. This judgment is not necessarily the same as the "judgment" that determines the *time period* for the running of interest.[19] *See* Reitz, J.A. 236-38; *cf. Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1026 (3d Cir. 1984), *cert. denied*, 475 U.S. 819 (1985).[20]

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1383, 1388-89 (11th Cir. 1982) (where statutory rate of interest changed after judgment, party owing damages "has no vested right to a continued 7% rate of interest on judgments entered against it; the rate of interest is a creature of statute, not contract"). *But see Litton Sys., Inc. v. AT&T, Inc.*, 746 F.2d 168, 170, 175-76 (2d Cir. 1984) (defendant had a right to continued interest at old rate where parties had stipulated to that rate as a matter of contract).

Kaiser has no vested right to a certain rate of interest even after the judgment is final and collectable. *A fortiori*, no such *vested* right existed *before* the entry of a final controlling judgment.

[19] Indeed, the first sentence of Fed. R. App. P. 37 specifically dictates that court awarded interest *must* run as of a date prior to entry of the final controlling judgment in certain circumstances.

Some federal courts use amended §1961 to determine the rate of prejudgment interest, *see, e.g., Columbia Brick Works, Inc. v. Royal Ins. Co.*, 768 F.2d 1066, 1071 (9th Cir. 1985), but the calculation of such interest over periods dating back before 1982 does not raise issues of retroactivity.

[20] Kaiser places heavy and entirely unfounded reliance on *United States v. Magnolia Petroleum Co.*, 276 U.S. 160 (1928), in which the Court considered the application of a 1924 amendment to the Revenue Act of 1921 that changed the starting date for interest on tax overpayments. Because the Commissioner had given final approval for the specific amount of the refund by issuing an "allowance" *before* the amendment was enacted, all rights and obligations with respect to interest had become unconditional under prior law.

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Under an equitable construction of 28 U.S.C. §1961, a final controlling "judgment" entered in the District Court after 1982 can and should, by force of law under amended 28 U.S.C. §1961, carry with it, as a bare minimum, the entitlement to interest calculated from an earlier date – the "judgment" of August 22, 1979.

The court below, while erring in failing to award full market rates, properly understood these fundamental concepts

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Kaiser incorrectly argues that the allowance date as of which interest *ends* in *Magnolia* (276 U.S. at 162) fell before the amendment to the IRS interest provision and that compares to the date as of which interest *begins* in the present case falling before the 1982 amendment to the federal District Court interest provision. Kaiser's incorrect contention that *Magnolia* "is directly analogous to this case" (Kaiser Brief at 28) ignores the holding that the allowance of the refund made the taxpayer fully "entitled" to interest according to the *rule then in force*. *Id.* at 162 (citing *Blair v. Birkenstock*, 271 U.S. 348, 350 (1926)). In the present case, in stark contrast, the final controlling judgment on the merits, which vested rights to interest, was not entered until long after 1982.

In *Blair*, unlike *Magnolia*, the Court applied the new interest provision contained in the 1924 amendment, rather than the old interest provision in the 1921 Act. The right to receive interest became unconditional on the IRS "allowance" date. This Court held that as "this date was subsequent to the enactment of §1019 of the Revenue Act of 1924, the allowance of interest must be in accordance with that section, not §1324 of the Act of 1921 which has been repealed." 271 U.S. at 350-51. *In both cases, interest started running prior to the enactment of the new interest provision in the 1924 Act!* In *Magnolia* the old interest provision applied because the date of allowance, when the interest stopped running and the right to interest vested and became unconditional, occurred prior to the enactment of the new interest provision, while in *Blair* the new interest provision applied because the vesting date occurred after its enactment.

The present case is analogous to *Blair*, rather than to *Magnolia*. Plaintiffs are entitled to interest over a period starting before the 1982 amendment to §1961, but the right to interest did not mature or vest until long after that amendment. Thus, as in *Blair*, the right to interest did not mature or become unconditional until after the new interest provision had taken effect, and interest certainly did not stop running before that change.

of vesting of rights which are central to a resolution of any issues of "retroactivity" and "manifest injustice." Kaiser, however, attempts to ignore this fundamental legal doctrine of "vesting" of rights in constructing its illusory argument of retroactivity to deny the Plaintiffs a compensatory rate of interest. As Plaintiffs point out below, Kaiser's contentions that the amendment to §1961 was intended to be "prospective" only (see Kaiser Brief at 14-17) is not only patently wrong, but is also irrelevant – since the right to receive interest did not *vest* until long after the new interest statute became effective (i.e. October 1, 1982).

B. THIS COURT'S *BRADLEY* ANALYSIS IS SOUND: Kaiser, In Its Attempt To Benefit From A Repealed Statute, States No Basis For Overruling The Longstanding And Unanimous Precedent Of This Court – That Intervening Remedial Or Procedural Changes In Law That Do Not Affect Vested Rights Apply To Pending Cases

1. Under *Bradley v. School Board Of Richmond*, Courts Should Apply The Law In Effect As Of The Time Of Decision

In *Bradley v. School Board of Richmond*, 416 U.S. 696, 710-711 (1974), this Court, in a unanimous[21] opinion authored by Mr. Justice Blackmun, held that a new statute mandating attorney fee awards should be applied in a case in which "the propriety of a fee award was pending resolution on appeal when the statute became law." The Court so held, notwithstanding the defendant's contentions of "retroactivity" because fees were awarded for services incurred prior to the enactment.

This Court in *Bradley* "anchor[ed] [its] holding" on the *longstanding principle* dating back to Mr. Chief Justice Marshall's statements in *United States v. Schooner Peggy*, 1

[21] Justices Marshall and Powell took no part in consideration of the case.

Cranch (5 U.S.) 103 (1801),[22] which provides the framework for analyzing Kaiser's contention that a repealed statute, rather than current law, should apply to Plaintiffs' interest award:

> the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

Bradley, 416 U.S. at 711.

Statutory Direction

With respect to "statutory direction" this Court in *Bradley* noted that its prior decision in *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), clarified any

[22] In the seminal case of *Schooner Peggy* Mr. Chief Justice Marshall set forth the principle that "if subsequent to the judgment and before the decision of the Appellate Court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligations denied." 1 Cranch (5 U.S.) at 110.

See also Maryland v. Baltimore & O. Ry. Co., 3 How. (44 U.S.) 534, 552 (1845) (refusing to apply statute that had been in effect at time suit instituted, but had been repealed while case was pending); *Dinsmore v. Southern Express Co.*, 183 U.S. 115, 120 (1901) (refusing to apply statute to respondent where statute had been amended to exempt express companies while the case was pending before the Supreme Court); *Gulf Colorado & S.F. Ry Co. v. Dennis*, 224 U.S. 503, 506 (1912) (reversing award of attorney's fees where state law authorizing fees was invalidated by state supreme court while case was pending); *Carpenter v. Wabash Ry. Co.*, 309 U.S. 23, 27 (1940) (applying statute as amended during appellate review to reclassify plaintiffs' judgment as one entitled to priority in bankruptcy); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 541 (1941) (reversing dismissal of plaintiff's complaint because state supreme court decision rendered while case was being reviewed recognized basis for claims); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981) (citing *Thorpe* and *Bradley* in concluding that state appellate court should consider petitioner's argument that it was entitled to jury instruction under new caselaw decided during appeal).

uncertainty "that even where the intervening law does not explicitly recite that it is to be applied to *pending cases*, it is to be *given recognition and effect*." *Bradley*, 416 U.S. at 715 (emphasis added).

Legislative History

As this Court stated in *Bradley*, "insofar as the legislative history * * * is supportive of either position, it would seem to provide at least implicit support for the application of the statute to pending cases." *Bradley*, 416 U.S. at 716 (footnotes omitted).

Manifest Injustice

Finally, in *Bradley* this Court set forth the basic factors to be analyzed in deciding whether to decline to apply current law, if doing so might work manifest injustice on private parties:

> The concerns expressed by the Court in *Schooner Peggy* and in *Thorpe* relative to the possible working of an injustice center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights.

416 U.S. at 717.

2. Kaiser's Belated Attack On The *Bradley* Analysis Is Illfounded And Disingenuous

Kaiser's Arguments Are Barred By Its Reliance On Bradley *Below*

In an extraordinary about-face from its principal argument below – *i.e.*, that "the District Court *correctly applied* * * * *Bradley v. School Board*, 416 U.S. 696 (1974)." (Kaiser's Third Circuit Brief at 22 (emphasis added)) – Kaiser now contends before this Court, that the *Bradley* analysis does *not*

apply to this case,[23] or that 188 years of precedent and this Court's unanimous decision in *Bradley* should be overruled,[24] based in part on this Court's recent decision in *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468 (1988), – a case whose facts and legal issues do not remotely bear on the instant case.[25]

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[23] Kaiser contended for the first time in its Petition for Rehearing in the Third Circuit that the *Bradley* analysis *it asked the court to apply* was improperly adopted and applied in this case.

As Plaintiffs pointed out in their Brief Opposing Kaiser's Certiorari Petition at 12, Kaiser's new argument is foreclosed by its failure to raise those contentions below. *See Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (issue first raised in response to Motion for Reconsideration in Court of Appeals was precluded from consideration by this Court); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).

[24] Faced with the undeniable result of application of *Bradley* on the facts of this case, Kaiser is compelled to fall back on the *extreme and misbegotten position that this recent unanimous decision based on 188 years of Supreme Court precedent should be overruled because its "manifest injustice" analysis generates "unfair results"!*

[25] Kaiser's suggestion that *Bowen* altered the law and excuses the dramatic change in its position is disingenuous:

(1) Neither the majority nor the concurring opinion in *Bowen* mentions or cites *Bradley* or *Schooner Peggy*. *Bowen* did not involve any issues bearing on those holdings. It involved rights of health care providers to reimbursement that were mature and unconditional under an unappealed District Court judgment prior to the Secretary's attempt to change HHS regulations. 109 S. Ct. at 471.

(2) *Bowen* involved an attempt by the Secretary of HHS to deny retroactively (after $2 million of reimbursable costs were incurred by private institutions in reliance on rules providing for reimbursement) reimbursements to health care providers pursuant to new rules. *Id.*

(3) Those new rules would have overruled a decision by the United States District Court that the Secretary had to make the reimbursements. *See id.* at 470-71. Instead of appealing the District Court judgment, the Secretary let the time for appeal run and simply issued new regulations denying the reimbursement the court had ordered. *Id.* at 471.

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Kaiser's Absurd Reasoning That Analysis For Manifest Injustice Produces Unfair Results

In a further astounding exercise in sophistry, Kaiser contends that the manifest injustice analysis of this Court in *Bradley* is "unworkable and unfair." It makes the remarkable, self-contradictory contention that the analysis "depends on individual case circumstances showing the presence or absence of 'manifest injustice'" and therefore produces "unfair results." Kaiser Brief at 35. Its attack on the fairness the manifest injustice analysis in *Bradley* flies directly in the face of the undisputed equities in this case of Kaiser's $18.6 million gain at Plaintiffs' expense from the ten years of delay since entry of the original judgment in 1979.

Kaiser criticizes the application of *Bradley* as arbitrary and unfair because the manifest injustice analysis could result in applying different versions of §1961 to cases in which interim judgments or verdicts are entered on the same day, where the final controlling judgment, in one case may be entered before 1982; – and in another case may not be entered until after 1982. Kaiser Brief at 35. There is nothing arbitrary or unfair in such results because:

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(4) The Secretary's attempt to deny retroactively reimbursements for costs already incurred was directly contradicted and prohibited by Congress in its statutory grant of rulemaking authority:

> the House and Senate Committee Reports expressed a desire to forbid retroactive cost-limit rules: "The proposed new authority to set limits on costs * * * would be exercised on a prospective, rather than retrospective, basis *so that the provider would know in advance the limits to Government recognition of incurred costs and have the opportunity to act to avoid having costs that are not reimbursable*." H.R. Rep. No. 92-1230, p. 83 (1971).

109 S. Ct. at 474 (emphasis added).

(5) The Secretary had abused the *limited grant of rulemaking power* in an attempt to impose his will over that of the Congress and over the power of the federal courts. *Id.* at 472-73.

1. Until a judgment is final and collectible, it continues to be subject to modification or reversal by the court, and the claim for interest and obligation to pay interest is not ripe or matured. (See pp. 14-20 above).
2. There is no vested right to rely on any particular rate of interest even after entry of a final controlling judgment. (See p. 17 & n.18 above).
3. The *Bradley* manifest injustice analysis, discussed below, provides flexibility and discretion specifically to prevent the application of new law to pending cases where the result would be *manifestly unjust. See, e.g., Litton Systems, Inc. v. AT&T, Inc.*, 746 F.2d 168, 175-76 (2d Cir. 1984).

The Bradley *Analysis Properly Affords Protection To Vested Property Rights*

The principle that courts should, as a general matter, apply current law and not law that has been repealed – (as well as the principle reaffirmed in *Thorpe* that intervening law should be applied to pending cases) is consistent with the separation of powers doctrines set forth in the Constitution. If the courts have already made a final determination of the rights and obligations of the parties through entry of a final controlling judgment,[26] or if a state legislature or some other body of positive law[27] secures a *vested property right* in the

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[26] Kaiser relies on *Greene v. United States*, 376 U.S 149 (1964), but disregards the final controlling judgment prior to change in law that created vested rights in *Greene*. As the court in *Thorpe* noted, Greene's "right to recover lost pay for a wrongful discharge was 'vested' as a result of our earlier decision in *Greene v. McElroy*, 360 U.S. 474 (1959)." *Thorpe*, 393 U.S. at 282 n.43.

[27] *Union Pacific Ry. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913) (state statute of limitations that affected railroad land rights not applied where it "interferes with antecedent rights," absent specific legislative intent).

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hands of private parties,[28] then the Congress may not alter those vested rights through legislation without making a proper declaration of retroactivity, and without acting for a proper legislative purpose.

Kaiser Improperly Attempts To Create Discord Where This Court Finds Harmony

In an attempt to create a spector of confusion among Supreme Court precedent, Kaiser throughout its brief entirely ignores the fundamental distinction between two different categories of cases:

> (1) those like this case that involve application of current law to cases pending in the courts when a change of law occurs, *e.g.*, *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), and
>
> (2) cases of true *retroactivity*, where application of new law defeats vested property rights or would amount to collateral attack on a final controlling judgment, *e.g.*, *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468 (1988).[29]

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In *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), this Court considered the retroactive application of a section of the 1978 Bankruptcy Act which excluded household items from *creditors' liens that were perfected prior to the enactment*. The Court invalidated the retroactive application of this new provision because it impaired "antecedent rights" that were fully vested prior to the enactment of the new statute. *Id.* at 79.

[28] This Court in *Thorpe* noted that the courts might refrain from application of current law if such application would result in "manifest injustice" by altering vested property rights of private parties. *Thorpe*, 393 U.S. at 282 & n.43.

[29] The seminal case in this line is *United States v. Heth*, 3 Cranch (7 U.S.) 399 (1806), in which the Court declined to apply a change in commission rates for customs collectors retroactively. Mr. Justice

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As recently as 1985, this Court has reiterated the harmony between application of current law under *Bradley* and "*another venerable rule* of statutory interpretation" disfavoring retroactive legislation defeating vested rights:

> [*Bradley*] rested on the general principle that a court must apply the law in effect at the time of its decision, see *Schooner Peggy*, 1 Cranch 103 (1801), which *Bradley* concluded holds true even if the intervening law does not expressly state that it applies to pending cases. 416 U.S. at 715. *Bradley*, however, expressly acknowledged limits to this principle. "The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." *Id.* at 720. *This limitation comports with another venerable rule of statutory interpretation*, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect.

Bennett v. New Jersey, 470 U.S. 632, 639-40 (1985) (emphasis added).

Lower Courts Agree On Application of Bradley *To §1961*

Contrary to Kaiser's suggestion of confusion in the lower courts (Kaiser Brief at 34-37), every Court of Appeals that has given any serious consideration to which version of §1961 to apply, where interest is calculated back to a date prior to the effective date of the amendment, has held that the issue is determined under the *Bradley* analysis, at least as

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Paterson, quoted in Kaiser Brief at 26, stated that statutes should not be construed to "interfere with * * * antecedent rights * * *" *Id.* at 413 (Paterson, J.). Mr. Justice Cushing, interpreting the change in law, concluded that it was not intended "to have retrospective effect, to *divest vested rights* of the collector * * *" *Id.* at 414 (Cushing, J.) (emphasis added).

long as the *final controlling judgment* on the merits was not entered *before* October 1, 1982.[30] Even the Second Circuit in *Litton*, on which Kaiser relies heavily,[31] found that the *Bradley* analysis applied to determine the applicability of the amendment of 28 U.S.C. §1961 to pending cases. *Litton Systems, Inc. v. AT&T, Inc.*, 746 F.2d 168, 172 (2d Cir. 1984).

C. THE *BRADLEY* FACTORS APPLIED TO THIS CASE: Kaiser Fails To Point To Any Evidence Bearing On The *Bradley* Factors (Statutory Direction, Legislative History Or Manifest Injustice) That Would Require Or Permit Awarding Interest Pursuant To A Statute (28 U.S.C. §1961) Repealed By Congress To Prevent The Very Vice Kaiser Seeks To Unjustly Benefit From

In contending that "retroactivity" is at issue, Kaiser refuses to recognize that the court below followed this Court's clear and cogent analysis of the distinction in *Bradley* between 1) retroactive application of new law to defeat vested property rights; and 2) application of current law to an open issue still pending in the court as in this case:

> In *Bradley*, Justice Blackmun, writing for a unanimous Court, *cautioned that the issue was not*

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[30] *Bailey v. Chattem, Inc.*, 838 F.2d 149, 155 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988); *Campbell v. United States*, 809 F.2d 563, 569-76 (9th Cir. 1987); *Brooks v. United States*, 757 F.2d 734, 741-43 (5th Cir. 1985); *Litton Systems, Inc. v. AT&T, Inc.*, 746 F.2d 168, 172-76 (2d Cir. 1984); *R.W.T. v. Dalton*, 712 F.2d 1225, 1234-35 (8th Cir.), *cert. denied*, 464 U.S. 1009 (1983); *cf. Evans v. City of Chicago*, 873 F.2d 1007 (7th Cir. 1989) (final controlling judgments entered *prior* to October 1, 1982 controlled by former law where judgment creditors subsequently sought to collaterally attack final controlling judgments). ***But see Merit Ins. Co. v. Leatherby Ins. Co.***, 728 F.2d 943, 944 (7th Cir. 1984) (per curiam) (no analysis): *United States v. Dollar Rent-A-Car Sys., Inc*, 712 F.2d 938, 940 n.5 (4th Cir. 1983) (dicta in footnote).

[31] As discussed below, pp. 37-38 & n.45, Kaiser has presented no evidence of "manifest injustice" such as that found on the facts of *Litton*.

> *whether the fee statute applied "retroactively"* to fees for services rendered prior to enactment, but rather whether a fee award was justified by current law. He states:
>
> > The question, properly viewed, then, is not simply one relating to the propriety of retroactive application of §718 to services rendered prior to its enactment, but rather, one relating to the applicability of that section to a situation where the propriety of a fee award was pending resolution on appeal when the statute became law.
>
> 416 U.S. at 710.

Kaiser Pet. A-17 n.15, 865 F.2d at 573 n.14 (emphasis added). Thus, the court below found no conflict between application of the *Bradley* rule to the present case and true retroactivity (as was the case in *Bowen*, see p. 23 & n.25 above):

> a statute is not "retroactive" simply because facts from the pre-enactment period are implicated. The presumption against "retroactivity" has generally been applied only when application of the new law would affect rights or obligations existing prior to the change in law.

Kaiser Pet. A-17, 865 F.2d at 573 (citations omitted).

There is no question that the amended version of 28 U.S.C. §1961 was in effect on the date of the Court of Appeals' judgment on the merits in 1984 and was still in effect in 1986 when this Court denied certiorari and the Court of Appeals mandate finally issued. Until that date, Plaintiffs were precluded from executing on the judgment, or securing any benefits therefrom, and there was no unconditional claim for, or obligation to pay, interest.

Kaiser's incorrect characterization of "retroactivity" is all-the-more mistaken, because the change in §1961 did not affect Kaiser's *substantive* liability for its intentional violation of antitrust law. Rather, it dealt only with the ancillary matter of insuring adequate interest to preserve the value of

judgments.[32] The current version of §1961 (as well as the Courts of Appeals' inherent, equitable and Rule 37 power to award adequate interest) was the law when the District Court issued its ruling on interest in 1988, when the Court of Appeals issued its ruling on interest in 1989 and presumably will be the law when this Court issues its ruling in 1990. Accordingly, *there is no issue of retroactive application of any law.*

Similarly, as discussed below, Kaiser's attack on the Court of Appeals' application of the threefold *Bradley* factors is without merit.

1. STATUTORY DECLARATION: Congress Repealed The Law Kaiser Seeks To Apply Today Long Before Any Rights Or Obligations On Interest Vested

Disregarding the language of the statute and the express intent of Congress in the legislative history, Kaiser argues without basis that there were "clear indications from both the language of the statute and the legislative history" supporting its request to apply a repealed statute, four years after the repeal.[33] Kaiser Brief at 17.

Kaiser incorrectly posits that the six month delay from the enactment of the amendment to the effective date implies that Congress intended that state law rates of interest would

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[32] *Cf. Bradley*, 416 U.S. at 710, noting that no final controlling judgment on the collateral issue of attorney's fees had been entered at the time the relevant statute was amended, just as no final controlling judgment exists yet in this case on the applicable rate of interest.

[33] Kaiser's "prospective" contentions are irrelevant, as it contends "that Congress intended that amended §1961 should apply * * * to the calculation of postjudgment interest on judgments entered *after* its effective date." (emphasis supplied). Kaiser Brief at 17-18. Thus, Kaiser concedes that Congress did not intend that the repealed statute would apply to judgments, such as the relevant final controlling judgment in this case, which were entered well after 1982.

apply to pending cases in which a final controlling judgment was not entered until long after 1982. Kaiser Brief at 14-18. Kaiser's interpretation ignores the concept of vesting and ignores the basic thrust of the Federal Courts Improvement Act (*FCIA*), of which the amendment to § 1961 is only a small part and which required a six month delay to allow time to reorganize the federal court system.[34] *See* Reitz, *Interest On Judgments*, J.A. 267 & n.42.

Kaiser attempts to incant an arbitrary rule that the T-bill rate does not apply to judgments entered before October 1, 1982.[35] There is no basis in the language of the statute to find

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[34] The FCIA enacted a major restructuring in the federal court system, including:

1) replacing the old Court of Claims and Court of Customs and Patent Appeals with the new Federal Court of Appeals;
2) merging the clerks offices for the abolished courts;
3) creating the new United States Claims Courts, including 16 new Article I judgeships; and
4) *transferring all pending cases* from the abolished courts to the Federal Court of Appeals *as of the effective date of the FCIA.*

See generally S. Rep. No. 97-275, 97th Cong. 2d Sess. at 2-12, *reprinted in* 1982 U.S. Code Cong. & Admin. News, at 12-22. Kaiser contends that an Act transferring pending cases was not intended to apply to pending cases.

[35] Kaiser's circular contention ignores the issue presented in this case regarding multiple judgments. As lower courts have noted, Kaiser's

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that Congress would have intended that interest on a 1984 Court of Appeals judgment (not recoverable until 1986) should be set at a ridiculously low and inadequate state law rate, pursuant to the very version of §1961 Congress repealed

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argument is based not on the language of the statute, but on misconceptions of the Admin. Office of the U.S. Courts. *Compare* Kaiser Brief at 23 *with Campbell*, 809 F.2d at 569 n.4. Kaiser's interpretation has been rejected by the Third, Fifth, Sixth, Eighth and Ninth Circuits.

Some courts, such as the court below, Kaiser Pet. A-16, 865 F.2d at 572, and the Eighth Circuit in *R.W.T. v. Dalton*, 712 F.2d 1225, 1235 (8th Cir.), *cert. denied*, 464 U.S. 1009 (1983), have simply recognized that the applicable law is determined as of the date of the final controlling judgment, not as of the date back to which interest is calculated.

Other courts, either pursuant to the agreement of the parties (*Handgards, Inc. v. Ethicon, Inc.*, 552 F. Supp. 820, 821 (N.D. Cal. 1982), *aff'd* 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985)) or at the request of the party seeking interest (*Bailey v. Chattem, Inc.*, 838 F.2d 149 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988); *Campbell v. United States*, 809 F.2d 563 (9th Cir. 1987)) have determined that a state law rate of interest should apply for the period up to October 1, 1982 and that a T-bill rate of interest should apply for periods of interest thereafter.

The Fifth Circuit has adopted a unique approach that the state law rate of interest should apply for periods of interest up to the date of the entry of the first "judgment" entered after October 1, 1982, and that a T-bill rate should apply for periods of interest calculated after the first such judgment. *See Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 848 F.2d 613 (5th Cir. 1988); *Reaves v. Ole Man River Towing, Inc.*, 761 F.2d 1111 (5th Cir. 1985).

The Second Circuit in *Litton Sys., Inc. v. AT&T, Inc.*, 746 F.2d 168 (2d Cir. 1984), held on the facts of that case that a state law rate of interest governed for interest calculated over a period subsequent to October 1, 1982, based on the parties' *stipulation* that the state law rate of 9% would apply – warranting a finding of "manifest injustice" in the application of a different rate. (See pp. 37-38 & n.45 below).

After a number of years of debate in the courts, the last court to rule on application of amended §1961 to pending cases reached the same conclusion as the first – as the court below correctly recognized there is no manifest injustice in application of current law to provide a more adequate rate of interest.

in 1982, precisely to override such insufficient state law rates.[36]

2. LEGISLATIVE HISTORY: The Legislative History Of The Amendment To §1961 Demonstrates A Clear Intent To Avoid The Very Result Sought By Kaiser: Inadequate Interest Under State Law To Preserve The Value Of Federal Court Judgments

In 1982, Congress determined that state law interest rates such as Pennsylvania's statutory 6% simple interest[37] were inadequate to carry out the purposes of interest on judgments in federal District Court under §1961. Congress established national rates more closely approximating the contemporary cost of money to correct in part the very vice Kaiser seeks to perpetuate. This purpose was clearly stated in the Senate Report on the 1982 amendments to §1961:

> Under current law, the interest rate on judgments in Federal Courts is based on varying State laws and frequently falls below the contemporary cost of money. [The proposed amendment] sets a realistic and nationally uniform rate of interest on judgments in the Federal courts that would be keyed to the *prime interest rate*[38] as determined by the Internal Revenue Service.

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[36] See pp. 33-34. Congress is presumed not to intend an absurd or unfair result. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982); *United States v. American Trucking Ass'n, Inc.*, 310 U.S. 534, 543 (1940); *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940).

[37] *See* Note, *The Postjudgment Interest Rate: Ignoring Reality For Too Long*, 23 Duq. L. Rev. 1083, 1083-84 (1985) (Pennsylvania's rate "represents the lowest non-variable postjudgment interest rate applied in the United States, both in the state and federal courts. At best, this represents a legislative oversight by the Pennsylvania Legislature; at worst, it is indicative of a * * * failure to grasp the realities of the modern economic world * * * .") (footnotes omitted), *quoted by the court below*, Kaiser Pet. A-20 n.18, 865 F.2d at 574 n.17.

[38] (Emphasis added). As noted in Plaintiffs' Opening Brief at 43 n.70, T-bill rates (2 to 3 points below commercial prime) were substituted

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The Senate Report went on to stress one of the principal policy purposes of adequate interest awards is to avoid any economic incentive for delay:

> This eliminates an economic incentive which exists today for a losing defendant to appeal a judgment and accumulate interest on the judgment award *at the commercial rate* during the pendency of the appeal.

S. Rep. No. 275, 97th Cong., 2d Sess., at 11, 1982 U.S. Code Cong. & Admin. News 11, 21 (emphasis added).[39] The concept behind this remedial legislation should be applied in the present case to avoid the injustice Congress intended to remedy.

Accepting Kaiser's position that its interest obligation is limited to 6% simple interest would reward Kaiser for its predatory conduct and allow it to retain the benefits of holding Plaintiffs' money during the pendency of litigation. That result would be expressly contrary to the purpose of interest awards under §1961 and the remedial legislative intent of Congress. *Cf. Campbell*, 809 F.2d at 574.

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at the request of the government on the ground that its cost of money is significantly below prime.

[39] A similar sentiment was expressed by the President in February 1979, in proposing the amendment to §1961:

> Current federal law *** permits *unrealistically low* as well as conflicting *rates of interest* while the decision is under appeal. Yet such interest may be essential in order to truly compensate the plaintiff or to avoid the unjust enrichment of the defendant. *** If a judgment on appeal is entered at a rate well below the prime interest rate, the losing party may well profit from the appeal.

H.R. Doc. No. 96-59, 96th Cong., 1st Sess. 4 (1979) (emphasis added).

3. MANIFEST INJUSTICE: Kaiser Did Not And Could Not Present Any Evidence Of Manifest Injustice In Support Of Its Contention That A Repealed Law Controls Its Interest Obligations

The court below correctly found that there is no "manifest injustice" that would justify Kaiser, an adjudicated antitrust predator, to pay only 6% simple interest under a law repealed four years before the Court of Appeals' mandate issued on its judgment on the merits.

(a) *Nature And Identity Of The Parties:* Current Law Should Be Applied To Carry Out Plaintiffs' Private Attorney General Role

Kaiser makes the preposterous contention that no issues of national concern are implicated when an antitrust violator seeks to avoid paying two-thirds of the award against it and to nullify the private attorney general role of Plaintiffs, contrary to this Court's specific holding in *Bradley*.[40] Kaiser Brief at 18-19.

The first factor of the manifest injustice analysis, *the nature and identity of the parties*, is principally concerned with distinguishing purely private disputes from cases that implicate broader national concerns. *See Bradley*, 416 U.S. at 717 (citing *Schooner Peggy*, 1 Cranch (5 U.S.) at 110). In finding that national interests are implicated by awarding adequate interest to successful plaintiffs, the Court of Appeals below correctly recognized the role of private attorneys general in furthering public policy, by making a defendant

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[40] *See Bradley*, 416 U.S. at 719 (noting private attorney general concept in civil rights enforcement created public interest in attorney fee statute at issue) (quoting *Newman v. Piggy Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968)).

accountable for its intentional predatory destruction of a small competitor to preserve its monopoly.[41]

The Court of Appeals observed that "the congressional mandate that plaintiffs who prevail in [antitrust actions] be awarded treble damages should not be diminished by insufficient postjudgment interest." Kaiser Pet. A-22, 865 F.2d at 575. *Cf. Fishman v. Estate of Wirtz*, 807 F.2d 520, 584 (7th Cir. 1986) (Easterbrook, J., dissenting) ("Any erosion of the trebling on account of a denial of interest undermines the deterrent force of the antitrust law.").

Kaiser, if it were to prevail on its contentions, will have lost every battle in this litigation, but despite condemnation of its conduct by two juries and the courts, it will have won its war to preserve and strengthen its monopoly by predatory destruction of Plaintiffs' business and circumvention of payment for the bulk of its liability.[42] As the Court below correctly found, public policy and the nature and identity of the parties is a factor that "*weighs heavily* against finding manifest injustice" in the application of current law. Kaiser Pet. A-22, 865 F.2d at 575 (emphasis added).

(b) Nature Of The Rights: Application Of Current Law Would Not Deprive Kaiser Of Any Vested Or Matured Or Unconditional Property Rights

Kaiser complains, in its Opening Brief at 24 n.5, that: "The Court of Appeals did not identify or address Kaiser's rights at all." It cannot expect the court to identify or address

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[41] Kaiser Pet. A-21, 865 F.2d at 575 (citing *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634-35 (1985)).

[42] According to Kaiser's position, Plaintiffs would not even receive an amount equivalent to single damages – failure to award adequate *postjudgment* interest would result in a diminution of ⅔ of the value of Plaintiffs' judgment (Plaintiffs' Opening Brief at 45) and *that judgment is already severely diminished by the failure to account for any prejudgment interest for the period from 1973 to 1979.*

vested rights where none exist – particularly where Kaiser has not articulated or even claimed any vested property rights.

Kaiser seeks to ignore the second manifest injustice factor, which focuses on whether application of a new law would deprive or infringe upon *vested* or unconditional or matured rights, 416 U.S. at 720. In the present case, as stressed above, the Court of Appeals correctly noted that there is no vested or unconditional right to any given rate of interest on a damage award that is not itself final.[43] Kaiser Pet. A-22, 865 F.2d at 575.[44]

Kaiser's Heavy Reliance On Litton *Is Misplaced*

Kaiser makes the bold and unsupported assertion that *Litton Systems, Inc. v. AT&T, Inc.*, 746 F.2d 168 (2d Cir. 1984), is "virtually identical to this [case]." Kaiser Brief at 23. Contrary to Kaiser's unsupportable assertion, *Litton* involved a significant award of $276 million, to which the parties *had stipulated* the applicable state interest rate of 9% – thus justifying the defendant's reliance that its interest liability was fixed. 746 F.2d at 170.

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[43] *Cf. Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1479-80 (3d Cir.) (defendant had no right to rely on 8% legal interest rate as of 1975) *cert. denied*, 109 S. Ct. 273 (1988); *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1023 (3d Cir. 1984) (defendant had no right to rely on prior 6% rate under Delaware law, but rather the current law rate of 16% was applicable over entire period), *cert. denied*, 475 U.S. 819 (1985).

[44] This conclusion follows from well settled law that there is no vested right to receive any particular rate of postjudgment interest *even after* a final controlling judgment is entered. *See Morley v. Lake Shore & M.S. Ry Co.*, 146 U.S. 162 (1892), and other decisions of this Court discussed above at p. 17 n.18.

In sharp contrast,[45] Kaiser had no justification to rely on its interest being limited to the inordinately low Pennsylvania 6% simple interest rate, which Kaiser knew might no longer be applicable as a matter of federal law and which Kaiser knew might be changed at any time as a matter of state law.[46] *Cf. Campbell v. United States*, 809 F.2d 563, 576 & n.9 (9th Cir. 1987) (distinguishing *Litton* on basis of stipulation).

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45 The manifest injustice found by the court in *Litton* arose in the context of the evidence presented by AT&T, none of which has any bearing on the present case:

1. The parties in *Litton* stipulated to a 9% rate, compared to Plaintiffs' protests in the present case that a 6% simple state law rate was inadequate.
2. The interest at issue in *Litton* represented only *15% of the judgment amount* in contrast to the present case which involves over 10 years of interest and *severe diminution* of the judgment, with interest measured at market rates as *almost 200% of the judgment amount*.
3. The District Court in *Litton Sys., Inc. v. AT&T, Inc.*, 91 F.R.D. 574, 575 (S.D.N.Y. 1981), *aff'd*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984), had denied attorneys fees and costs due to misconduct in discovery and defendants argued that $40 million interest sought would improperly be used to compensate for denial of $10 million fees. *Litton Sys., Inc. v. AT&T, Inc.*, No. 76 Civ. 2512 (WCC), Defendants' [Brief in] Opposition to Plaintiffs' Motion to Amend the Judgment at pp. 3, 13 (S.D.N.Y. filed June 3, 1983).
4. *Litton* involved an attempted monopolization claim based on a tariff filed with the F.C.C. which was at least arguably protected by the *Noerr-Pennington* doctrine (*see Litton Sys., Inc. v. AT&T, Inc.*, 700 F.2d 785, 806-12 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984)). The present case involves vicious intentional predatory conduct where the sufficiency of the evidence to support liability was established by the Court of Appeals even before the 1979 liability verdict (579 F.2d at 31).

46 *Cf. Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1023 (3d Cir. 1984), *cert. denied*, 475 U.S. 819 (1985).

Kaiser now postulates wrongly that:

> The evolving body of case law, both in the Third Circuit and elsewhere, supported Kaiser's *right to assume* that interest ran at Pennsylvania's 6% simple interest rate.

Kaiser Brief at 21 (emphasis added). Kaiser grossly mischaracterizes the "evolving body of case law, both in the Third Circuit and elsewhere."[47] Moreover, Kaiser has not suggested any way in which caselaw on other disputes may have given Kaiser a *vested right* to limit its obligation to pay interest at Pennsylvania's 6% simple interest rate in this litigation, which had not proceeded to final controlling judgment on the merits. See pp. 14-20 & nn.15-20 above.

Indeed, although Kaiser claims some amorphous, unvested "right to rely" or "right to assume"[48] Kaiser has

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47 See p. 31 n.35 above. As the court below noted, it had cited the Eighth Circuit's *Dalton* holding with approval in an earlier opinion. Kaiser Pet. A-20, 865 F.2d at 574. Moreover, Third Circuit caselaw generally favors market rate interest awards. See Plaintiffs' Opening Brief at 39 & n.60. See also p. 37 & nn.43-44 above (no right to rely).

48 Contrary to the gross mischaracterization in Kaiser's Brief at 21, Plaintiffs *specifically put Kaiser on notice that they would seek an adequate rate of interest*, but Kaiser never tendered any money to Plaintiffs or into court to stop or reduce the running of interest. *See, e.g.*, R. 601 (quoting Plaintiffs' April 1, 1985 Motion for Posting of Security which sought increase in bond for interest "*without prejudice to Plaintiffs' right to seek interest * * * at a higher rate.*") (emphasis added).

Kaiser never made any arguments to either of the courts below based on "estoppel," and naturally, as the District Court found, *sua sponte*, (Kaiser Pet. A-46) there is and could be no *estoppel* in Plaintiffs' counsels' statements on *potential* ultimate resolution of a *legal* issue, particularly where the Court before which any such statements were made did not take the action sought by Plaintiffs and Plaintiffs' *expressly reserved the right to seek interest at an adequate rate. Cf. United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986) (no cognizable estoppel); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982) (no unequivocal statement; position not successfully asserted);

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never presented any evidence of any *detrimental reliance* or claimed any *vested rights*. The unrefuted evidence of record establishes that *the only result* of Kaiser's delay of payment on the judgment since 1979, and refusal to tender any payment of its liability until July 3, 1986 and continued refusal to tender any interest whatsoever – *is Kaiser's gain, at Plaintiffs' expense*, at commercial market rates, *of $18.6 million*. Plaintiffs seek only to disgorge that gain, not to impose any further obligations on Kaiser.

(c) *Nature Of The Impact Of The Change In Law Upon Existing Rights:* Application of Current Law On Interest To A Pending Case Has No Impact On Existing Rights And Does Not Alter The Substantive Law Prohibiting Kaiser's Predatory Conduct

Concepts of manifest injustice are focused on the impact of change in law on *vested rights;* – and not, as Kaiser contends, on desired results postulated by parties to litigation. Kaiser had no reason or right to believe that, with interest rates approaching 18-20% by 1980 (*see* Reitz, J.A. 220), it could ignore the power of courts to award adequate interest or bank on the fact that Pennsylvania law would not be changed – or that Congress might not make the amendments it ultimately did.

The third factor in the analysis for manifest injustice considers the *impact of the change in law upon the rights of the parties*. The inquiry here is whether the change imposes new and unanticipated obligations that would have caused the

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Gleason v. United States, 458 F.2d 171 (3d Cir. 1972) (position not successfully asserted); *United States v. Mills*, 372 F.2d 693, 696-97 (10th Cir. 1966) (no adjudication of issue); *Lawrence v. ICC*, 629 F. Supp. 819, 822 (E.D. Pa. 1985) (no irreconcilable contradictory positions).

party to change the conduct that led to the lawsuit. *Bradley*, 416 U.S. at 720.

In *Bradley*, this Court noted that clarification of the right to a fee award had no bearing on the underlying violation of civil rights by defendants. 416 U.S. at 720-21 ("there was no change in the substantive obligations of the parties"). Similarly, refinements in the interest rate on judgments have no bearing on Kaiser's *substantive* liability under the antitrust laws. As early as 1972, Kaiser began a course of conduct to intentionally violate the antitrust laws in its ultimately successful effort to destroy a small competitor. Kaiser was bound to know that such conduct would give rise to a claim for damages and an obligation to pay interest sufficient to preserve the value of an adverse judgment.[49]

Moreover, this Court in *Bradley* found that the statutory provision for attorneys fees "merely serves to create an additional basis or source for the Board's potential obligation to pay attorneys' fees." In language particularly appropriate for the instant case, this Court then stated: "It [the statutory basis] does not impose an additional or unforeseeable obligation on [the Board]." 416 U.S. at 721.

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[49] As an adjudicated violator of the antitrust laws, Kaiser bears all the risks of uncertainty caused by its illegal conduct. *See Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 265 (1946). One of those risks was the uncertainty about the rate of interest over the long periods of delay caused by Kaiser's post-trial motions. Kaiser alone was in a position to alleviate this uncertainty by paying the judgment or tendering the amount of its anticipated liability and accrued interest into court under Fed. R. Civ. P. 67. *Cf. Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1023 (3d Cir. 1984), *cert. denied*, 475 U.S. 819 (1985); *Campbell*, 809 F.2d at 574.

Because of stays obtained by Kaiser, Plaintiffs could take no action to enforce the judgment and were relegated to the sole remedy of seeking an adequate award of interest following the conclusion of the litigation on the merits. Kaiser took the risk that it might or might not get away with its gross unjust enrichment. It cannot now complain because Congress and the courts determined that it should pay a more adequate rate of interest on the judgment.

As set forth in Plaintiffs' Opening Brief at 31-46, independent of any amendment to 28 U.S.C. §1961, there is strong and longstanding precedent for Kaiser's obligation to pay a fully compensatory rate of interest for delay in payment of Plaintiffs' judgment. Accordingly, the statutory basis for a more adequate rate of interest does not impose any additional or unforeseeable obligations on Kaiser.

D. PUBLIC POLICY: Kaiser Ignores All Of The Important Policy Concerns And Purposes Of Interest Awards That Compel Finding Against Kaiser's Contentions

1. Interest Awards Should Recognize Economic Reality And Preserve The Value Of Judgments

Kaiser requests that this Court totally disregard economic reality and the litigants' cost of money in the private marketplace. In changing 28 U.S.C. §1961, Congress attempted to bring some concepts of economic reality into the determinations of interest to be awarded as a routine matter on federal District Court judgments. The repealed statute Kaiser seeks to apply fails to preserve the value of the judgment and encourages litigants to string out litigation to profit from submarket rates of interest.

2. Interest Awards Are Intended To Prevent The Unjust Enrichment Kaiser Seeks At Plaintiffs' Expense

This Court should not adopt a ruling on interest sought by Kaiser that would allow inequitable profits secured by wrongdoers during long periods of delay at the expense of their victims. The Court should not allow federal equity courts to be used as vehicles for unjust enrichment.

3. Kaiser Improperly Seeks To Use Court Delay To Circumvent The Antitrust Laws

Furthermore, this Court should not permit Kaiser to enjoy monopoly profits from its destruction of Plaintiffs' business more than ten years ago, and at the same time to avoid payment of its full liability under the antitrust laws, which was established in 1979. Long-term business and litigation strategies to string out litigation and profit from delay should not be condoned, particularly in an antitrust case where the wrongdoer continues to enjoy the monopolistic fruits of its intentional, anticompetitive and predatory actions.

4. Kaiser Ignores The Implications That Denial Of Adequate Interest Will Have In Encouraging Dilatory Litigation

Finally, in repealing the old version of §1961, Congress sought to eliminate incentives for dilatory relitigation of issues in the courts. This Court should send a clear signal to litigants that, while they are entitled to challenge the verdicts of juries and the judgments of the courts through post-trial motions and appeals, if they do so, and lose, they should expect to pay at least a fully compensatory rate of interest over periods of delay in execution on the judgment during which they had the use and enjoyment of someone else's money.

III. KAISER'S CONTENTION THAT ONLY ONE OR TWO DAYS OF INTEREST SHOULD BE AWARDED IS OUTRAGEOUS AND WAS PROPERLY REJECTED BY THE COURT BELOW

Kaiser contends that interest should be calculated beginning on July 2, 1986, and run for only one day until payment of a sum of $9,567,939 with no interest on July 3, 1986.

For ten years, since its liability was established in August 1979, Kaiser has continued to enjoy the benefits of the use of Plaintiffs' money. See Plaintiffs' Opening Brief at 5-8. Plaintiffs respectfully refer the Court to their Opening Brief at

17-30, where Plaintiffs demonstrate that interest should run from the date of the original judgment in their favor: August 22, 1979.

Kaiser's Brief does not state any basis on which to stray from the well-accepted rule that interest should run from the date of the original judgment in favor of Plaintiffs.

A. Failure To Award Interest Adequate To Preserve The Value Of The Judgment Would Allow Unjust Enrichment And Unduly Encourage Post-Trial Litigation And Delay

Kaiser by its one-day-of-interest contention, seeks a result that has no justification in law or any of the equitable or public policy purposes of interest awards discussed above at pp. 42-43. See also Plaintiffs' Opening Brief at 13-30. Kaiser fails to acknowledge that interest on the judgment measures the time value of money for detention of the judgment debt.

The courts must not allow predatory monopolists such as Kaiser to abuse their monopoly power to drive small competitors such as Plaintiffs out of business – and then use long periods of court delay to offset their exposure by accumulating monopoly profits and severely diminishing the value of their liability over the passage of time.

B. Neither Of The Two Lower Court Cases Cited By Kaiser Supports Denial Of Interest Over The Period Of Court Delay

In suggesting that only one day of interest should be awarded over the ten years of delay, Kaiser acknowledges the merit of the equitable arguments in Plaintiffs' Opening Brief, but fails to address the equities of this case. Kaiser cites two Court of Appeals' decisions in support of its hollow equity arguments. Those cases were decided on facts inapplicable to the present case. *Affiliated Capital Corp. v. City of Houston*,

793 F.2d 706 (5th Cir. 1986); *Brown & Williamson Tobacco Corp. v. Jacobson*, Nos. 86-2474, 86-2475, 1987 U.S. App. LEXIS 15194 (7th Cir. Nov. 6, 1987).

In *Affiliated Capital*, the District Court had entered judgment NOV for all defendants and the issue of liability was in substantial doubt. A sharply divided Court of Appeals, although having reinstated the jury's award, denied interest back to when liability was first decided. As Judge Patrick Higginbotham noted, separately concurring in the result:

> In my view, this defendant was defeated on the merits because it passed through a *time window of changing law*, rather than because it engaged in conduct that was malevolent by antitrust standards.

793 F.2d at 713 (emphasis added). By contrast, in the present case, the sufficiency of Plaintiffs' evidence was established by the Court of Appeals in 1978,[50] and the jury's verdict of liability for intentional predatory conduct in 1979 has never been disturbed by any court.

As Judge Brown noted in his dissent in *Affiliated Capital* denial of full interest would be an "inequitable use of equity":

> The "equity" done by the majority penalizes the victorious plaintiff for the District Court's error, and gives the defendant a windfall. [An award of interest from the date of the original judgment] puts both parties in the position in which they would already be but for the District Court's error.
>
> The Court, under the guise of "equity" denies interest essentially because the case was close. Considering the functions of interest, it hardly seems significant, in equity or otherwise, that the case was close, involved difficult issues, or engendered a vigorous dissent. Moreover, I think it is unwise and shortsighted to set a precedent establishing different

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[50] *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 31 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978). *See also* p. 47 & n.52 below.

> qualitative levels of victory. A win, whether by four touchdowns or a last second field goal, is a win.

793 F.2d at 713-14, *see also id.* at 714 (dissent of Rubin, Brown, Johnson & Williams, JJ.).

Moreover, Kaiser ignores the severe diminution suffered by Plaintiffs in the value of their judgment by failure to account for any prejudgment interest over the period from 1973 to 1979. Denial of those six years of interest on top of the denial of ten years of interest from 1979 suggested by Kaiser, would not even permit Plaintiffs to receive the single damages proved, – let alone the ample recovery of treble damages to which they were entitled as of 1979. That ample recovery is mandated by Congress both for deterrence and to account for all of the damages to Plaintiffs that are not susceptible to simple measurement in dollar terms – such as Plaintiffs' endurance of more than 15 years of bitter litigation against a huge monopolist, during the prime years of their lives when they should have been engaged in the profitable and productive enterprise that Kaiser destroyed.[51]

Similarly, the *Brown & Williamson* case does not support Kaiser's position that only one day of interest should be awarded in the present case. In *Brown & Williamson*, the court, in a libel case, had to determine whether to grant, under its Rule 37 authority, any back, postjudgment interest, where the lower court had set aside a jury's $3 million compensatory award, and had awarded nominal damages of only one dollar. On a very different theory, the Court of Appeals had held that plaintiff should recover $1 million compensatory damages. The Seventh Circuit held that interest on its $1 million award would run only from the date of its decision fixing the amount of compensatory damages.

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[51] *See Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 & n.36 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 Harv. L. Rev. 1566, 1566 (1966); Vold, *Are Threefold Damages under the Anti-Trust Act Penal or Compensatory?*, 28 Ky. L.J. 117 (1939); *see also* Plaintiffs' Opening Brief at 16 & n.20-21.

The Seventh Circuit itself determined the amount of the compensatory damage award, taking into account the "probable extent of actual loss [the plaintiff] had suffered and would suffer in the future." *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1138 (7th Cir. 1987). Thus, its decision under Fed. R. App. P. 37 is consistent with decisions allowing interest dating back to the original judgment, *only if* a subsequent recalculation of damages does *not* account for the time value of money over periods of delay. *See* Plaintiffs' Opening Brief at 17-30.

Moreover, Kaiser ignores and overlooks the fact that in *Brown & Williamson*,

> The parties [did] not dispute that the postjudgment interest on the $2,050,000 *punitive damages* should run from the *date of the original judgment*.

1987 U.S. App. LEXIS 15194 at *2 n.1 (emphasis added). That agreement of the parties, conclusively refutes Kaiser's argument on the "equities" with respect to treble damages.

Finally, Kaiser's Brief at 43 makes the extraordinary contention that Plaintiffs' "victory was far from 'clear cut.' " Aside from the record which demonstrates that Kaiser's statement is patently untrue,[52] a dispute over the appropriate

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[52] *Plaintiffs' judgment was repeatedly, unequivocally and conclusively affirmed* by two unanimous juries (1979 & 1981), by two District Court Opinions (1981 & 1983), two unanimous decisions of separate panels of the Court of Appeals (1978 & 1984), and two denials of certiorari by this Court (1978 & 1986), and by the Justice Department.

In improperly attempting to relitigate the merits, Kaiser makes vague reference in its brief (Kaiser Brief at 43) to the Justice Department's criticism of the Third Circuit's analysis of the "price squeeze" issue. *Kaiser omits the conclusion of the Justice Department that Kaiser's second petition for writ of certiorari should be denied* because Kaiser's liability for intentional destruction of Plaintiffs' business was established by sufficient evidence *independent* of the price squeeze:

> Columbia has presented only a single theory of liability – that Kaiser violated Section 2 by seeking to drive Columbia out of

(Continued on following page)

amount of interest on a judgment is not a proper forum to relitigate the merits. Kaiser must accept the facts and the law as determined by the juries and the courts.

C. Kaiser Cannot Challenge The Power Of The Court Below To Award Interest Back To The Date Of A Verdict

Kaiser argues to this Court, for the first time, and contrary to its position below, that §1961 precludes determination of postjudgment interest from December 2, 1981, contending that this was the verdict date, not the judgment date, which did not occur until two days later. Kaiser Brief at 41. As pointed out in Plaintiffs' Brief Opposing Kaiser's Certiorari Petition at 12-13, Kaiser is foreclosed from raising this new argument contrary to its position below.

Kaiser's only motivation for this change in position concerning the two days of interest involved is an attempt to take advantage of a lower T-bill rate that "settled" December 3, 1981. See Plaintiffs' Opening Brief at 44 n.72. Thus, if Kaiser were to prevail on its contention that Plaintiffs can only recover interest from the 1981 re-calculation of damages; – and if Plaintiffs were to be limited to only Treasury Bill rates, under the federal interest statute for routine District Court judgments, then there could be a swing of $4 million in the award of interest (between $8 million and $12 million), depending on whether interest runs from the date of the verdict (December 2, 1981), or from the date when judgment

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> business – supported by a variety of evidence, including the evidence relating to the price squeeze. A determination that the price squeeze evidence cannot support Columbia's theory of liability does not render *the other evidence* insufficient to support the jury's verdict.

Brief for the United States as Amicus Curiae at 21, No. 84-1907 (U.S.) (emphasis added).

was entered by the district court on the verdict (December 4, 1981).

This extraordinary swing occurs because, under 28 U.S.C. § 1961 as amended, interest rates are fixed, as a matter of administrative convenience, on a day certain and are held constant whether market rates go up or down.

In a belated attempt to deny Plaintiffs $4 million of the gain Kaiser obtained from the use of Plaintiffs' money, Kaiser now disingenuously contends that the Courts of Appeals have no power to award interest from the date of a "verdict" rather than a "judgment." Kaiser's contention is squarely contrary to principles of equity, inherent power of the courts, Fed R. App. P. 37, the purposes behind §1961 and the weight of authority in the lower courts.[53] Fed. R. Civ. P. 58 requires entry of judgment forthwith, as was requested by Plaintiffs counsel on December 2, 1981 (J.A. 143). Kaiser's belated contention that both courts below should have awarded interest from December 4 instead of December 2 should be rejected.

CONCLUSION

For the reasons stated in Plaintiffs Opening Brief in No. 88-1771 and in this Brief, Plaintiffs ask this Court to reaffirm the inherent and equitable power of the Courts of Appeals and their authority under Fed. R. App. P. 37 to award adequate interest to carry out the purposes of interest awards.

Plaintiffs request the Court to remand to the Court of Appeals with instructions to award interest on $9,567,939 at monthly average prime rates (as reported by the Federal Reserve Bank), compounded monthly, from August 22, 1979 to the date of full payment of all principal and interest.

Only if this Court rejects Plaintiffs' position that they should receive full market rate interest, then in the alternative, Plaintiffs ask that the Court remand with instructions

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[53] See cases cited in Plaintiffs' Opening Brief at 21 n.31; Reitz, J.A. 235-262.

that interest be calculated under 28 U.S.C. §1961 as amended from August 22, 1979 at the T-bill rate of 10.05%, compounded annually pursuant to §1961(b).

To the extent the Court of Appeals held that interest should not be calculated at 6% simple interest, and that interest should begin to run as of a date earlier than July 1, 1986, it should be affirmed.

Respectfully submitted,

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APPENDIX

OF

RULES AND STATUTES

1. Fed. R. App. P. 37 provides:

> Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the District Court. If the judgment is modified, or reversed with a direction that a judgment for money be entered in the District Court, the mandate shall contain instructions with respect to allowance of interest.

2. 28 U.S.C. §1961, as amended effective October 1, 1982, provides:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a District Court. Execution therefore may be levied by the marshal, in any case where, by the law of the State in which such Court is held, execution may be levied for interest on judgments recovered in the Courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.
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> (b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

(c)(1)This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at the underpayment rate or overpayment rate (whichever is appropriate) established under section 6621 of the Internal Revenue Code of 1954.

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal Circuit, at the rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Claims Court only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

3. Fed. R. Civ. P. 67 provides:

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing. The party making the deposit shall serve the order permitting deposit on the clerk of the court. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U.S.C. §§2041, and 2042; the Act of June 26, 1934, c. 756, §23, as amended (48 Stat. 1236, 58 Stat. 845), U.S.C., Title 31, §725v; or any like statute. The fund shall be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court.